

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

KIRBY GARDNER, #1003719	§	
	§	
VS.	§	CIVIL ACTION NO. G-05-248
	§	
DOUG DRETKE	§	

OPINION AND FINDING

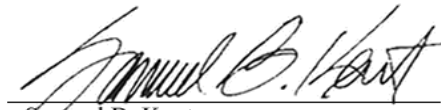
In an Opinion and Order dated August 16, 2005, this Court informed Plaintiff, Kirby Gardner, that his Notice of Appeal, filed by virtue of the “ mailbox rule”¹ on August 10, 2005, in an attempt to appeal from a Final Judgment entered on July 6, 2005, was untimely. The Court suggested that Gardner seek a thirty-day extension if he could show good cause or excusable neglect for missing the deadline. On September 6, 2005, Gardner filed a “ Judicial Notice” claiming his Notice of Appeal was timely filed since Saturdays and Sundays following the entry of the Final Judgment are excluded from the time calculation; therefore, Gardner claimed he does not need an extension. Accordingly, even if Gardner’ s Notice of Appeal were able to be construed as a motion for extension of time, he has made no effort to show good cause or excusable neglect in the event his Notice of Appeal is found to be untimely filed.

Unfortunately, for Gardner, Saturdays, Sundays and holidays are only excluded if the thirty-day deadline falls on such a day, otherwise, they are counted. See Fed. R. App.P. 26(a)(3) Since the deadline in this case, August 5, 2005, was a Friday, no exclusions are available to Gardner and his Notice of Appeal was filed five days too late.

¹ Houston v. Lack, 487 U.S. 266 (1988)

It is, therefore, the **FINDING** of this Court that Gardner' s Notice of Appeal was untimely filed.

DONE at Galveston, Texas, this 16th day of September, 2005.



Samuel B. Kent
United States District Judge